

ELECTRO-CRAFT, INC.,	: Order Affirming Decision
Appellant	:
	:
v.	:
	: Docket No. IBIA 96-66-A
ACTING ANADARKO AREA DIRECTOR,	:
BUREAU OF INDIAN AFFAIRS,	:
Appellee	: March 3, 1997

This is an appeal from an April 17, 1996, decision of the Acting Anadarko Area Director, Bureau of Indian Affairs (Area Director; BIA), rejecting a claim for payment under section 114 of the Act of Oct. 5, 1992, 106 Stat. 1374, 1396, in connection with the construction of the Native Sun Water Park in Lawton, Oklahoma. For the reasons discussed below, the Board affirms the Area Director's decision.

Section 114 of the Act of Oct. 5, 1992, provided:

(a) Notwithstanding the provisions of section 101(c) of Public Law 98-473, Act of October 12, 1984, 98 Stat. 1849 (25 U.S.C. 123c), [1/] the Secretary of the Interior is authorized in his discretion, to pay lawful debts incurred between February 1, 1991, and July 31, 1992, on behalf of the Kiowa Comanche Apache Intertribal Land Use Committee in connection with the construction and operation of the Native Sun Water Park in Lawton, Oklahoma, from funds in the United States Treasury held jointly for the Kiowa, Comanche, and Apache Tribes: Provided, That such payments may not exceed an aggregate of \$1,300,000.

(b) Prior to exercising the discretion described in section (a)))

(1) the Secretary or his designee shall by no later than November 1, 1992, provide written notice to the Kiowa, Comanche, and Apache Tribes, and the Kiowa Comanche Apache Intertribal Land Use Committee describing with specificity the nature and amount of the obligation(s) the Secretary has identified as lawful debts described in section (a); and

1/ 25 U.S.C. § 123(c) (1994) provides:

"Hereafter tribal funds may be advanced to Indian tribes during each fiscal year for such purposes as may be designated by the governing body of the particular tribe involved and approved by the Secretary including: [list of purposes omitted]."

(2) the Kiowa, Comanche, and Apache Tribes shall have until February 1, 1993, to resolve any of the lawful debts described in section (a) in accordance with the terms of their respective tribal constitutions.

(c) In the event the Kiowa, Comanche, and Apache Tribes individually or through the Kiowa Comanche Apache Intertribal Land Use Committee do not provide documentation to the Secretary by March 1, 1993, confirming payment of the lawful debts described by the Secretary or justifying why any of the amounts should not be paid, the Secretary may exercise his discretion to pay the obligations.

BIA established procedures for implementation of this provision and published notice to creditors on December 31, 1993, and January 8, 1994. On January 19, 1994, appellant submitted a claim in the amount of \$13,192.64, stating that the claim was for "extra work that was performed at the Native Sun Water Park in addition to the contract work" between April and July, 1991. Appellant attached to its claim a list of nine change orders with descriptions of labor and materials for each. When asked to submit a copy of its contract for this work, appellant stated that it had no written contract for its extra work which, appellant further stated, had been ordered by the construction manager.

On March 29, 1996, the Area Director advised the three Tribes and the Kiowa, Comanche, and Apache Intertribal Land Use Committee of his intent to deny appellant's claim because of the lack of a written contract. No objection was made.

On April 17, 1996, the Area Director wrote to appellant, stating:

It is my decision that your claim shall not be paid. My decision is based upon the following information:

No written contract or authorization to perform such work or to provide such additional Change Orders Nos. 1-9 can be found. Your work was accomplished based upon a verbal authorization, which we are unable to honor.

Appellant appealed the Area Director's decision to the Board, contending:

[Appellant] was hired to perform goods and services for the establishment and performance of the "NATIVE SUN WATER PARK" in Lawton, Oklahoma. [Appellant] acted in good faith and carried out their contract.

At no time during any negotiations was [appellant] advised that a written contract for goods and services was required for payment of its services. "NATIVE SUN WATER PARK" supervised and acknowledged all construction performed without reservation. Ap-

pellant advises that currently, to his knowledge, all or most of the contract materials are still located at the construction site.

* * * * *

Appellant * * * states and affirms that the contract price above is due and owing for the following reasons, to-wit:

1. The Contract was made with KCA Intertribal Land Use Committee. Weaver General Construction Company was the Construction Manager.
2. The goods and services for the construction of the requested "Native Sun Water Park" was rendered and accepted without objection.
3. Native Sun Water Park has been unjustly enriched by the contractual performance of [appellant].
4. No requirement of the necessity of a written contract was even mentioned until [appellant] demanded payment for its services.
5. Appellant * * * contends that it should be able to replevin its salvageable materials at this time, in order to reduce monetary damages.

Therefore, Appellant respectfully submits that [appellant] is entitled to its contract price of \$13,192.64, minus any salvageable materials it may retrieve at the construction site. Appellant requests immediate permission and access to the construction site for the purpose of salvaging usable materials. Denial to do so would constitute unjust enrichment to the "Native Sun Water Park" and would further deny Appellant due process of law. [Emphasis in original.]

Notice of Appeal at 1-2. No briefs were filed.

The Board first observes that it is not a court of general jurisdiction (See, e.g., Dawn Mining Co. v. Portland Area Director, 20 IBIA 50 (1991)) and therefore has no authority to issue an order allowing appellant to enter the construction site for the purpose of retrieving salvageable materials. Rather, the only authority the Board has here is to review the administrative decision issued by the Area Director. Further, because of the discretionary nature of the authority vested in the Secretary by section 114 of the Act of Oct. 5, 1992, the scope of the Board's review is limited.

As was stated in Downs v. Acting Muskogee Area Director, 29 IBIA 94, 97 (1996), "the Board's role [in reviewing discretionary BIA decisions] is to determine whether BIA has given proper consideration to all legal prerequisites to the exercise of discretion. If it has, and if there is support for its decision in the record, the Board will not substitute its

judgment for BIA's." Further, an appellant who challenges a discretionary BIA decision bears the burden of showing that the BIA official did not properly exercise discretion. E.g., Sault Ste. Marie Tribe of Chippewa Indians v. Minneapolis Area Director, 25 IBIA 236, 242 (1994).

In this case, appellant concedes that it does not have a written contract for the work for which it seeks compensation. Thus, there is no contention here that the Area Director based his decision upon an error of fact.

It was certainly within the Area Director's discretion to deny compensation in a case where the claimant could not produce a written contract in support of its claim. Appellant has not shown that the Area Director exercised his discretion improperly.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, the Area Director's April 17, 1996, decision is affirmed.

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge